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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

16 RICHARD GONZALES, MATTHEW WALKER,
17 JON HERNANDEZ, JULIANNE CHUANROONG,
18 and DARREN TODD, on behalf of themselves, the
general public, and those similarly situated

19 Plaintiffs,

20 v.

21 TP-LINK USA CORPORATION,

22 Defendant.

CASE NO. 3:18-cv-05824-RS

UNLIMITED CIVIL CASE

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT OR, IN
THE ALTERNATIVE, TO STRIKE
CLASS ALLEGATIONS**

Honorable Richard Seeborg

Date: August 22, 2019

Time: 1:30 p.m.

Location: Courtroom 03, 17th Floor

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1 **I. Introduction**

2 Plaintiffs Richard Gonzales, Matthew Walker, Jon Hernandez, Julianne Chuanroong, and
 3 Darren Todd (“Plaintiffs”) allege a straightforward case of false and deceptive marketing by TP-
 4 Link USA Corporation (“TP-Link” or “Defendant”) as follows: TP-Link advertises its routers (the
 5 “TP-Link Routers” or “Routers”) as capable of operating at particular speeds of data transfer (e.g.,
 6 “1300 + 450Mbps Wireless Speed,” “1.75Gbps total available bandwidth, which includes
 7 450Mbps at 2.4GHz and 1300Mbps at 5GHz,” and “delivering up to 1750Mbps of Wi-Fi speed”),
 8 when the Routers are incapable of operating even close to the advertised speeds.

9 In their original Complaint, Plaintiffs alleged that these representations were false and
 10 confusing to consumers. Plaintiffs also alleged that the TP-Link Routers did not comply with
 11 certain technical standards (“802.11” standards). In moving to dismiss the original Complaint,
 12 TP-Link argued that Plaintiffs’ allegations regarding router speeds and the 802.11 standards were
 13 inextricably intertwined and that the question of whether the Routers conformed to the 802.11
 14 standards was the determinative issue in the case. Plaintiffs disagreed and maintained that they
 15 had pled two separate theories (one regarding speed representations such as those above and the
 16 other regarding compliance with the 802.11 standards), each of which could stand on its own. To
 17 simplify this case, Plaintiffs have now dropped the allegations regarding the 802.11 standards and
 18 are focusing on TP-Link’s separate speed representations.

19 In response, TP-Link again tries to divert attention from its straightforward speed
 20 misrepresentations by focusing once again on the 802.11 standards, which are no longer part of
 21 this case. TP-Link argues that Plaintiffs Gonzales and Walker have always understood that users
 22 could not actually experience the advertised speeds when using the Routers, and that Plaintiffs’
 23 sophisticated understanding of the Routers precludes their ability to pursue this case. As set forth
 24 below, TP-Link’s argument is completely at odds with the pleadings in this case, and with TP-
 25 Link’s own prior statements.

26 In its first motion to dismiss, TP-Link argued that Plaintiffs did not understand (1) that the
 27 real world speeds experienced by users are irrelevant to whether the Routers comply with the
 28 802.11 standards (because the standards concern theoretical speeds at an underlying “physical”

1 layer not experienced by users) and (2) that the allegation that the TP-Link Routers did not
 2 comply with 802.11 standards was not the same as the allegation that the Routers do not actually
 3 perform at the advertised speeds when used by consumers. TP-Link now reverses course to argue
 4 that Plaintiffs *did* understand those technical issues and thus Plaintiffs cannot now allege that TP-
 5 Link deceived Plaintiffs and consumers regarding the speeds of the Routers. But TP-Link's
 6 accusation of inconsistency between the pleadings is a fantasy; Plaintiffs never alleged that
 7 consumers interpret TP-Link's speed representations merely as expressions of consistency with
 8 certain technical standards concerning theoretical speeds at to the "physical" layer of the TP-Link
 9 Routers.

10 To the contrary, Plaintiffs have consistently maintained TP-Link misled consumers with
 11 representations about the *actual* data transfer speeds of the TP-Link Routers. The only difference
 12 between the original Complaint and the Amended Complaint is that Plaintiffs' claims have been
 13 simplified to focus on TP-Link's explicit speed representations, without reference to the 802.11
 14 standards. TP-Link's contention that there is some inherent contradiction here, requiring dismissal
 15 of Plaintiffs' straightforward claims, has no merit.

16 TP-Link then doubles down on its opening gambit, arguing that *all* reasonable
 17 consumers—not just Plaintiffs—understand that TP-Link's representations regarding the wireless
 18 speeds of the TP-Link Routers are just technical minutiae regarding theoretical speeds at the
 19 "physical" layer of the Routers. TP-Link thus asks this Court to hold, as a matter of law, that TP-
 20 Link never represented or implied anything about the data speeds consumers actually experience.
 21 But ordinary consumers are not experts in computer networking and ordinary consumers do not
 22 interpret TP-Link's marketing claims in the manner TP-Link suggests, especially given that TP-
 23 Link's speed representations often appear separately from any reference to the 802.11 standards
 24 and often appear near representations regarding how consumers will actually experience the
 25 Routers (such as, "Smooth Gaming and HD Streaming"). Moreover, TP-Link's ads do not
 26 mention anything about the "physical" layer of the Routers and the ads do not clearly state that
 27 consumers cannot actually experience the advertised speeds.

28

1 In sum, the original Complaint and Amended Complaint both plausibly allege (1) that an
 2 ordinary consumer would—and in the case of the Plaintiffs *did*—read TP-Link’s marketing
 3 claims as an indication that the TP-Link Routers are actually capable of providing data transfer
 4 rates at or near the advertised speeds when used by consumers and (2) that TP-Link’s false speed
 5 claims thereby induced consumers—including Plaintiffs—to purchase the TP-Link Routers at
 6 prices higher than Plaintiffs and consumers would have otherwise paid and/or instead of
 7 competing routers. TP-Link’s arguments to the contrary—that Plaintiffs cannot even allege
 8 plausible claims—have no basis and should be rejected.

9 TP-Link also moves to dismiss the Amended Complaint for a variety of technical reasons,
 10 such as lack of standing, an alleged failure to identify an injury-in-fact, an alleged bar to the
 11 negligent misrepresentation claim, inability to seek an injunction, and inability to assert unjust
 12 enrichment. Each of these arguments is just as baseless as TP-Link’s primary arguments.
 13 Accordingly, the motion should be denied in full.

14 **II. Background**

15 Plaintiffs allege that Defendant manufactures, markets, advertises, and sells various
 16 models of wireless routers which Defendant claims offer customers certain bandwidths or speeds
 17 of data transfer (also referred to as the routers’ signal rates). TP-Link makes representations
 18 about the “speed” or rate of data transfer for each Router model. However, TP-Link fails to
 19 disclose that the routers actually transfer data at speeds far below the advertised rates.

20 Each Plaintiff purchased one of the TP-Link Routers after reading and relying on the
 21 specific representations TP-Link made about the Router’s data transfer speeds. Dkt. 50 (“Am.
 22 Compl.”) ¶¶ 51-56, 61-67, 72-76, 81-85, 91-95. For example, Plaintiffs Gonzales, Hernandez,
 23 and Chuanroong purchased Archer C7 AC1750 Wireless Dual Band Gigabit Routers on
 24 Amazon.com after reading representations on the Router’s product page such as “1300Mbps
 25 wireless speeds over the crystal clear 5GHz band and 450 Mbps over the 2.4GHz band,”
 26 “1.75Gbps total available bandwidth, which includes 450Mbps at 2.4GHz and 1300Mbps at
 27 5GHz,” and other representations confirming that the product offered 1750Mbps of total
 28 bandwidth. Am. Compl. ¶¶ 29-30, 51-52, 72-73, 81-82.

1 The Amended Complaint identifies specific misrepresentations by TP-Link regarding the
 2 speeds of the purchased routers (Am. Compl. ¶¶ 22-35) and alleges that substantially similar
 3 representations (made in similar locations and using a common format with rate specifications in
 4 Mbps that are characterized as the “speed” of the TP-Link products) are made for all of the TP-
 5 Link Routers at issue. *See* Am. Compl. ¶¶ 2, 21, 36, 104. Each of these representations is false
 6 because, among other things, the TP-Link Routers are incapable of achieving the advertised
 7 speeds. Am. Compl. ¶¶ 41-45, 57, 68, 77, 87, 96, 118-19, 135. Moreover, TP-Link admits that it
 8 knows that the Routers cannot actually deliver the advertised speeds. *See* Dkt. #16 at 10 (arguing
 9 that its advertising was not misleading because experts in networking would know that the IEEE
 10 802.11 standards “are protocols for only the MAC sublayer and physical layer,” and that the
 11 advertised speeds do not refer to the “application layer . . . where user activities occur”).

12 If Plaintiffs had known that the wireless data rates actually available to and capable of
 13 being experienced by them when using the Router for wireless data transfer were far below the
 14 advertised speeds, they would not have paid as much for the routers, or would have purchased
 15 different wireless routers. *Id.* ¶¶ 58-59, 69-70, 78-79, 88-89, 97-98.

16 **III. Legal Standard**

17 To survive a Rule 12(b)(6) motion to dismiss, the claimant must allege “enough facts to
 18 state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
 19 (2007). In deciding such a motion to dismiss, the court must accept all factual allegations as true
 20 and draw all reasonable inferences in favor of the plaintiff. *Usher v. City of Los Angeles*, 828 F.2d
 21 556, 561 (9th Cir. 1987). A claim is facially plausible when the plaintiff pleads facts that “allow
 22 the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
 23 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). This is not akin to a “probability
 24 requirement,” but there must be “more than a sheer possibility that a defendant has acted
 25 unlawfully.” *Id.*

26 Under Federal Rule of Civil Procedure 9(b), a party must “state with particularity the
 27 circumstances constituting fraud or mistake,” including “the who, what, when, where, and how of
 28 the misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)

1 (internal quotation marks omitted). However, “Rule 9(b) requires only that the circumstances of
 2 fraud be stated with particularity; other facts may be pleaded generally, or in accordance with
 3 Rule 8.” *United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 992 (9th Cir. 2011).

4 **IV. Argument**

5 **A. Plaintiffs’ Case Theory Is Essentially the Same, Even Though the Routers’
 6 Compliance with the 802.11 Standards Is Not at Issue**

7 TP-Link’s primary argument is that “Gonzales and Walker’s allegations in the FAC are
 8 diametrically opposed to their prior allegations and omissions” purportedly because the original
 9 Complaint makes clear that they understood TP-Link’s speed representations to refer to “the
 10 physical layer speed, and not the application layer speed.” Dkt. #54 at 8-9. Nothing could be
 11 further from the truth. The original Complaint, just like the Amended Complaint, alleged that
 12 Plaintiffs Gonzales and Walker believed that the TP-Link Routers were capable of providing the
 13 advertised speeds when used for real world wireless data transfer, that they purchased routers
 14 based on those beliefs, and that they were harmed because the Routers are not capable of
 15 providing such speeds when used by consumers for wireless data transfers. *See, e.g.*, Compl. (Dkt.
 16 1-3) ¶¶ 30 (Mr. Gonzales “was specifically looking for a router could transfer data at a high rate
 17 of speed”), 43 (same for Mr. Walker), 32 (“Mr. Gonzales also reviewed and relied on
 18 representations on Amazon.com that originated from TP-Link regarding the wireless data speed
 19 of the router.”), 45 (same for Mr. Walker), 39 (“Had Mr. Gonzales known that the TP-Link
 20 router’s wireless data rate was so slow, or that it was not compliance with the IEEE 802.11n
 21 specification, he would not have paid as much for the router, or would have purchased a different
 22 wireless router.”), 53 (same for Mr. Walker). The Amended Complaint is entirely consistent with
 23 and elaborates on those allegations. *See, e.g.*, Am. Compl. ¶¶ 51, 53, 58, 61, 63, 69.

24 TP-Link’s characterization of the original Complaint is not only a complete U-turn from
 25 TP-Link’s previous argument that Plaintiffs Gonzales and Walker misunderstood the 802.11
 26 standards,¹ but it makes no sense. Plaintiffs have never claimed that they and other ordinary

27 ¹ In its first motion to dismiss, TP-Link’s leading argument was that Plaintiffs’ claims should be dismissed
 28 because “They Rely on an Inaccurate Interpretation of the 802.11 Standards.” *See* Dkt. 16 at 10. TP-Link

1 consumers understood that the speeds prominently advertised for the TP-Link Routers have
 2 *nothing* to do with the real-world performance of the Routers, and that consumers, such as
 3 themselves, are instead concerned only with theoretical speeds at the unobservable “physical”
 4 layer of the Routers. Indeed, the original Complaint contains no reference at all to physical layers,
 5 the testing discussed in the original Complaint measured the Routers’ actual speeds when used,
 6 and the Court has acknowledged that “plaintiffs insist that despite a great deal of technical detail
 7 pleaded in the complaint, they are representing ordinary consumers who would not understand the
 8 distinctions between ‘layers’ and who would reasonably understand defendants to be making
 9 claims about the speed consumers will actually experience when using the routers.” Dkt. #47 at 7.

10 Plaintiffs’ theory is essentially the same as it was in the beginning: TP-Link misled
 11 consumers with representations about the data transfer speeds consumers will actually experience
 12 when using the TP-Link Routers. While the original Complaint also alleged noncompliance with
 13 the 802.11 standards, the Amended Complaint avoids disputes about the 802.11 standards and
 14 alleges that TP-Link’s marketing is misleading even assuming the Routers comply with the
 15 technical standards. If anything, Plaintiffs have simplified their allegations by removing
 16 references to the 802.11 standards and by providing even more detail regarding TP-Link’s explicit
 17 speed representations. Despite TP-Link’s suggestions to the contrary, Plaintiffs *never* alleged that
 18 they understood at the time of their purchases both that (a) the 802.11 standards applied only to
 19 theoretical speeds at the physical layer and (b) TP-Link’s speed representations were just
 20 references to the way in which the 802.11 standards applied to the “physical” layer of the Routers.
 21 Moreover, TP-Link has argued that compliance with the 802.11 standards is a separate issue from
 22 the actual speed available to users (*see* Dkt. #16 at 10) and TP-Link made multiple
 23 representations regarding the speeds of its Routers separately from, and independently of,

24
 25 argued that “Plaintiffs’ claims are based on what a user experiences in the application layer . . . where user
 26 activities occur,” but that the 802.11 standards concern only theoretical speeds at a “physical” layer and
 27 that “realized speeds” are irrelevant to whether the routers comply with the standards. *Id.* (“Realized
 28 speeds do not make a router incompatible—or compatible—with the 802.11. Plaintiffs incorrectly allege
 that it is the ascertained throughput speeds that supposedly makes the routers noncompliant with the
 802.11n and 802.11ac standards.”).

1 representations regarding the Routers' compliance with the 802.11 standards (see Am. Compl.
 2 ¶¶ 22-35).

3 Because the Amended Complaint does not contradict the original Complaint with respect
 4 to Plaintiffs' reliance on the deceptive advertising at issue, Defendant's primary grounds for its
 5 motion to dismiss (Dkt. #54 at 7-12 (Argument section A and portions of sections B and C,
 6 discussing supposed inconsistency between the Complaint and Amended Complaint)) fail to
 7 support Defendant's motion.

8 **B. The Amended Complaint Plausibly Alleges Deceptive Conduct**

9 To meet the pleading standard for fraud claims under the UCL, CLRA, and FAL, a
 10 plaintiff must show that "members of the public are likely to be deceived." *Williams v. Gerber*
 11 *Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008). The challenged conduct "is judged by the effect
 12 it would have on a reasonable consumer." *Puentes v. Wells Fargo Home Mortg., Inc.*, 160 Cal.
 13 App. 4th 638, 645 (2008) (citation omitted). A true representation can mislead a reasonable
 14 consumer if it is actually misleading or has the capacity, likelihood or tendency to deceive or
 15 confuse members of the public. *See Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951 (2002). Whether a
 16 representation is deceptive so as to mislead a reasonable consumer is normally a question of fact
 17 incapable of resolution on a motion to dismiss. *Williams*, 552 F.3d at 938-39; *Organic Consumers*
 18 *Ass'n v. Sanderson Farms, Inc.*, 284 F. Supp. 3d 1005, 1014-15 (N.D. Cal. 2018) (Seeborg, J.)
 19 (denying a motion to dismiss on plausibility grounds and explaining that "[w]hether a business
 20 practice is deceptive is generally a question of fact that requires weighing of evidence from both
 21 sides" and that courts grant motions to dismiss under the reasonable consumer test only in rare
 22 situations in which the facts alleged in the complaint "compel the conclusion as a matter of law
 23 that consumers are not likely to be deceived").

24 TP-Link argues that no reasonable consumer could possibly be misled by TP-Link's speed
 25 representations because TP-Link repeatedly references the 802.11 standards in its advertising.
 26 Dkt. #54 at 11-14 (Argument section C and portion of section B). This argument fails in at least
 27 three ways.

1 First, TP-Link cannot establish either that consumers understand that the 802.11 standards
 2 concern theoretical speeds at a physical layer or that consumers understand the difference
 3 between that standard and the real-world speeds they experience. In fact, TP-Link does not even
 4 attempt to make such a showing; it simply mischaracterizes the record by stating “Gonzales and
 5 Walker previously confirmed—and the Court found—that a reasonable consumer would view TP-
 6 Link’s advertising as representing that its routers conform with the 802.11 standards and the
 7 physical layer speeds regulated by those standards.” Dkt. #54 at 12. As set forth above, neither
 8 Plaintiffs nor the Court stated that consumers understand that the 802.11 standards concern only
 9 theoretical speeds at a physical layer.

10 Second, TP-Link does not and cannot establish that every speed representation at issue
 11 was made in clear conjunction with a reference to a particular 802.11 standard. In the Amended
 12 Complaint, Plaintiffs have included multiple examples of speed representations where a reference
 13 to an 802.11 standard did not appear in the same sentence or even in the same section of the page
 14 (or package) as the speed representation. *See Am Compl. ¶¶ 22-33.* In many cases, the speed was
 15 characterized as “Wi-Fi speed” and not in terms of compliance with a theoretical standard.

16 Third, TP-Link does not and cannot establish that consumers understand that any speed
 17 representation appearing anywhere near a reference to an 802.11 standard necessarily refers to the
 18 theoretical physical layer speed (*i.e.*, is just another way of identifying compliance with the
 19 standard) rather than to actual speeds available to consumers for wireless data transfer. TP-Link
 20 notes that the names or descriptions of the routers often appear in a format such as AC1750 or
 21 N600, where the “AC” or “N” refers to the 802.11 standard applicable to the router and that most
 22 pages include, somewhere on the page, a further reference to the standard (*e.g.*, that the router
 23 “supports 802.11ac”). Dkt. #54 at 13. However, those sparse references do not explicitly inform
 24 consumers that multiple, separate speed representations such as “450Mbps at 2.4GHz and
 25 1300Mbps at 5GHz” or “delivering up to 1750Mbps of Wi-Fi speed” (*see, e.g.*, Am Compl. ¶ 28)
 26 should *not* be interpreted to mean that the Routers are actually able to transfer data wirelessly at
 27 those speeds but only that the Routers comply with standards governing capacity at a “physical
 28 layer.” *Cf. Reid v. Johnson & Johnson*, 780 F.3d 952, 958-59 (9th Cir. 2015) (holding that a

1 complaint should not be dismissed where it is far from clear typical consumers understand
 2 whether two aspects of a product are related, such as that a product containing partially
 3 hydrogenated vegetable oil necessarily has trans-fat).

4 It is certainly plausible that a reasonable consumer who looks at a statement on a product
 5 webpage or package indicating that a router operates at a particular speed, such as 1,750 Mbps,
 6 will interpret that as a statement that the router operates quickly enough to transfer that much data
 7 each second in actual use, at least when operating at peak performance. A reasonable consumer is
 8 not an electrical engineer or computer scientist and simply will not have the technical experience
 9 to surmise that TP-Link intended its statements to describe only the physical network layer and
 10 not the *actual* speeds the routers are capable of producing in operation.

11 TP-Link’s argument that there is no plausible allegation of a false or misleading
 12 representation or marketing in this case is similar to the argument that was rejected in another
 13 class action lawsuit against TP-Link. *See Arroyo v. TP-Link USA Corp.*, No. 5:14-cv-04999-EJD,
 14 2015 U.S. Dist. LEXIS 133473 (N.D. Cal. Sept. 29, 2015). In *Arroyo*, a plaintiff filed a lawsuit
 15 based on TP-Link’s advertising claims that a different set of routers operated at speeds of “up to
 16 500 Mbps.” *Id.* at *2. TP-Link moved to dismiss the claims, arguing that the “speed” claims were
 17 not misleading because it was “common knowledge” that the routers would not always operate at
 18 the listed speeds. *Id.* at *20-21. The court denied the motion to dismiss the fraud-based claims on
 19 that ground, noting that the advertising claims were facially misleading to the extent they
 20 suggested the routers were capable of speeds up to 500 Mbps, when they were not. *Id.* at *21
 21 (“However, if the allegations are construed in the light most favorable to the Plaintiff, it is
 22 apparent a significant proportion of the population is likely to be deceived by the representations
 23 made, even with an ‘up to’ qualification.”).

24 Similarly, in *Walter v. Hughes Communications, Inc.*, 682 F. Supp. 2d 1031, 1043-45
 25 (N.D. Cal. 2010), the plaintiffs sued an internet service provider, alleging that the defendant made
 26 representations (in a format such as “speeds up to x megabits per second”) regarding the data
 27 transfer rates of the internet connections that it offered but that “the actual speeds obtainable
 28 under any of the respective service plans is substantially and systematically slower than is

1 advertised.” The court denied the defendant’s motion to dismiss and held that the allegations were
 2 sufficiently plausible and particular because the plaintiffs alleged defendant made measurable
 3 claims and the plaintiffs alleged that they were unable to experience the advertised speeds and
 4 systematically experienced much lower speeds. *Id.* Here, Plaintiffs allege (and TP-Link has
 5 already conceded) that all consumers systematically experience speeds far below the advertised
 6 speeds and that consumers cannot possibly experience the advertised speeds.

7 TP-Link cannot mislead its customers to sell its routers, make millions of dollars from the
 8 sales, and then escape liability by arguing in a motion to dismiss that there was no deception or
 9 confusion because everyone supposedly realized what TP-Link’s claims meant on some highly
 10 technical level. Accordingly, Defendant’s motion should be denied; Plaintiffs have adequately
 11 stated claims under the CLRA, UCL, and FAL based on the misleading statements about the TP-
 12 Link Routers operating at specific high speeds.

13 **C. Plaintiffs May Pursue Claims Concerning Non-Purchased Routers**

14 Defendant argues that Plaintiffs lack standing to assert claims about router models that
 15 they did not purchase. *See* Dkt. #54 at 14-16. The Ninth Circuit has squarely rejected this
 16 argument, holding that whether plaintiffs “may be allowed to present claims on behalf of others
 17 who have similar, but not identical, interests depends not on standing, but on an assessment of
 18 typicality and adequacy of representation”—i.e. issues to be decided at class certification, not on a
 19 motion to dismiss. *Melendres v. Arpaio*, 784 F.3d 1254, 1261-62 (9th Cir. 2015). Indeed, earlier
 20 this year, the Ninth Circuit specifically reversed a district court that had held a plaintiff lacked
 21 standing to represent purchasers of the defendant’s other products “regardless of the similarity of
 22 items purchased.” *Nunez v. Saks Inc.*, No. 17-56821, 2019 U.S. App. LEXIS 16147, at *2 (9th
 23 Cir. May 30, 2019). “Because Nunez has demonstrated standing to pursue his individual claims,
 24 the district court should have deferred consideration of whether he was an adequate class
 25 representative until the class certification stage of proceedings.” *Id.*; *see also Morgan v. Apple*
 26 *Inc.*, No. 17-cv-05277-RS, 2018 U.S. Dist. LEXIS 82836, at *28-29 (N.D. Cal. May 16, 2018)
 27 (Seeborg, J.) (holding that whether non-purchased products are sufficiently similar to purchased
 28 products boils down to “questions of whether common issues predominate and whether plaintiff

1 can adequately represent absent class members, issues that are better resolved at the class
 2 certification stage") (quoting *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 922 (N.D. Cal. 2012));
 3 *Koh v. S.C. Johnson & Son, Inc.*, No. C-09-0927 RMW, 2010 U.S. Dist. LEXIS 654 at *7 (N.D.
 4 Cal. Jan. 6, 2010) (deferring ruling on which product lines would be included in the class until the
 5 class certification stage). Similarly, here, Plaintiffs have alleged sufficient economic injury to
 6 demonstrate standing to pursue their individual claims and any questions about their ability to
 7 pursue class claims with respect to other router models must wait until class certification.

8 Even if the Court were to consider whether the misleading marketing and resulting harm
 9 for non-purchased routers are substantially similar to those for the router models purchased by
 10 Plaintiffs, it is clear that Plaintiffs alleged such substantial similarity. *See* Am. Compl. ¶¶ 2, 21,
 11 36, 104; *cf. Astiana v. Dreyer's Grand Ice Cream, Inc.*, No. C-11-2910 EMC, 2012 U.S. Dist.
 12 LEXIS 101371, at *37-38 (N.D. Cal. July 20, 2012) (rejecting argument that claims regarding
 13 non-purchased products should be dismissed where plaintiffs challenged "the same basic
 14 mislabeling practice" across a single kind of product line (ice cream), despite differences in
 15 ingredients). Moreover, TP-Link has conceded that there is a common core pattern at issue for all
 16 the TP-Link Routers, as there is necessarily a significant difference between the speeds advertised
 17 (which are theoretical speeds for a "physical layer" of the routers) and the speeds experienced by
 18 the consumers. Dkt. #16 at 10 (explaining "the data rate measured at the application layer is
 19 always lower than the physical layer data rate").

20 **D. The Complaint Adequately Pleads Fraud With Particularity**

21 The Court should not dismiss the Amended Complaint under Rule 9(b) because Plaintiffs
 22 have pleaded the "the who, what, when, where, and how" relating to Defendant's misconduct. *See*
 23 *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). The "who" is TP-Link. The
 24 "what" comprises the sales of TP-Link Routers and the speed representations specifically set forth
 25 in the Amended Complaint, and substantially similar marketing statements. Am. Compl. ¶¶ 21-36.
 26 The "when" is identified for each individual Plaintiff. Am. Compl. ¶¶ 51, 61, 72, 81, 91. The
 27 "where" for Plaintiffs are the webpages they viewed and the sites where they purchased the
 28 Routers. Am. Compl. ¶¶ 22-35, 51-53, 56, 61-64, 67, 72-73, 76, 81-82, 85, 91-92, 95. The "how"

1 is by misleading consumers regarding the actual speeds of the TP-Link Routers to cause
 2 consumers to purchase the Routers at prices above what consumers would otherwise pay. Am.
 3 Compl. ¶¶ 4-7, 38-50, 54-60, 65-71, 74-80, 83-90, 93-99, 113-127, 133-138, 140-154, 174-181.

4 TP-Link incorrectly argues that the Amended Complaint fails to identify any injury-in-
 5 fact. To the contrary, each Plaintiff alleged that he or she “would not have paid as much for the
 6 router, or would have purchased a different wireless router” if he or she had known the actual
 7 speeds of the Routers. Am. Compl. ¶¶ 58-59, 69-70, 78-79, 88-89, 97-98. Those allegations are
 8 sufficient allegations of injury-in-fact under controlling law. *Davidson v. Kimberly-Clark Corp.*,
 9 889 F.3d 956, 965-66 (9th Cir. 2018) (“To properly plead an economic injury, a consumer must
 10 allege that she was exposed to false information about the product purchased, which caused the
 11 product to be sold at a higher price, and that she ‘would not have purchased the goods in question
 12 absent this misrepresentation.’”) (applying California law).

13 TP-Link’s contentions that Plaintiffs must, at this time, provide an accounting of the
 14 specific price premiums they paid and to describe in more detail what problems they had with the
 15 Routers, what speeds they experienced, and the testing of their personal Routers (see Dkt. #54 at
 16 17-18) are inconsistent with *Davidson*. See 889 F.3d at 965 (holding that plaintiff was not
 17 required to allege ensuing damage from the product, just that she would not have purchased the
 18 product or would have paid less for it absent the deception); *see also Arroyo*, 2015 U.S. Dist.
 19 LEXIS 133473 at *16-21 (rejecting TP-Link’s argument that plaintiff’s complaint was deficient
 20 under Rule 9(b) to the extent plaintiff did not explain how he estimated that he would never
 21 realize certain speeds, and holding it was sufficient that plaintiff alleged the product could never
 22 reach speeds close to the advertised speed and that he would not have bought the product or
 23 would have paid less if he had known the truth). Plaintiffs are also not required to specify precise
 24 dollar amounts for the price premium, as that would require evidence and expert analysis far in
 25 excess of any pleading requirement. See *Gregorio v. Clorox Co.*, No. 17-cv-03824-PJH, 2018
 26 U.S. Dist. LEXIS 19542, at *16-17 (N.D. Cal. Feb. 6, 2018) (rejecting the argument that plaintiffs
 27 were required to include “specific factual allegations about the dollar amount plaintiffs paid for
 28 each product” and noting “[c]ourts routinely deny motions to dismiss similar actions in which the

1 complaint alleges that a price premium was paid but fails to allege the specific amount paid for
 2 each product").

3 TP-Link cites *Boysen v. Walgreen Co.*, No. C 11-06262 SI, 2012 U.S. Dist. LEXIS
 4 100528 (N.D. Cal. July 19, 2012), to argue that Plaintiffs were required under Rule 9(b) to
 5 specifically identify an alternative router that would provide certain speeds in actual usage. Dkt.
 6 #54 at 18. But *Boysen* does not impose any such requirement; rather, the *Boysen* court simply
 7 listed the *complete* lack of injury allegations in that case. 2012 U.S. Dist. LEXIS 100528, at *23-
 8 24 (noting that the plaintiff did not allege "that the products caused him any physical injury,"
 9 "that consumption of the products may cause physical harm," "that the products function less well
 10 than advertised," or "that had defendant's juice been differently labeled, he would have purchased
 11 an alternative juice"). Here, by contrast, Plaintiffs have alleged that the TP-Link Routers perform
 12 far below the advertised speeds and that they would not have paid as much if the TP-Link Routers
 13 were accurately advertised, regardless of the prices and features of other routers. That is sufficient
 14 to allege an injury-in-fact under *Davidson*.

15 TP-Link also errs in arguing that Plaintiffs fail to adequately allege TP-Link's knowledge
 16 of its misconduct. Dkt. #54 at 19. In fact, Plaintiffs explicitly and directly allege that TP-Link
 17 knowingly misleads consumers regarding the actual speeds they are capable of experiencing when
 18 using the TP-Link Routers, that TP-Link tests the Routers before distribution, and that TP-Link
 19 has acknowledged that speeds users experience (at the application layer) are substantially less
 20 than the advertised speeds (which TP-Link alleges are intended to describe theoretical speeds at
 21 the physical layer). *See, e.g.*, Am. Compl. ¶¶ 5, 38, 46, 118-19, 124, 145. TP-Link has also
 22 conceded that it knows that the Routers cannot actually deliver the advertised speeds. Dkt. #16 at
 23 10 (stating that the IEEE 802.11 standards "are protocols for *only* the MAC sublayer and physical
 24 layer," acknowledging that "Plaintiffs' claims are based on what a user experiences in the
 25 application layer . . . where user activities occur," and acknowledging that "the data rate measured
 26 at the application layer is always lower than the physical layer data rate"). Indeed, TP-Link has
 27 now decided that its best bet is to argue that *everyone* knows that consumers cannot actually
 28 experience the advertised speeds. Dkt. #54 at 11-13. As set forth above, that supposition has no

1 basis in reality and, in any event, is not what Plaintiffs allege. TP-Link is not entitled to dismissal
 2 of Plaintiffs' claims simply because it contests Plaintiffs' allegations.

3 **E. The Negligent Misrepresentation Claim Is Not Barred by the
 4 Economic Loss Doctrine**

5 TP-Link incorrectly argues that the economic loss doctrine bars Plaintiffs' negligent
 6 misrepresentation claim. Although that doctrine bars tort claims for losses arising out of a
 7 contract, it does not apply to "claims that 'a contract was fraudulently induced.'" *Grouse River*
 8 *Outfitters Ltd v. NetSuite, Inc.*, No. 16-cv-02954-LB, 2016 U.S. Dist. LEXIS 141478, at *29
 9 (N.D. Cal. Oct. 12, 2016) (quoting *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988
 10 (2004)). This includes inducement claims stated in negligent misrepresentation. *See Frye v. Wine*
 11 *Library, Inc.*, 2006 U.S. Dist. LEXIS 96075, at *8 (N.D. Cal. Dec. 4, 2006) ("As Plaintiff's
 12 negligent misrepresentation claim can be characterized as relating to Defendant's inducement of
 13 Plaintiff to contract, there is also no question of it being barred by the economic loss rule.").

14 Here, Plaintiffs allege TP Link fraudulently induced them to enter into contracts, including
 15 that TP-Link knowingly misled Plaintiffs regarding the actual speed of the TP-Link Routers, that
 16 the actual speed capabilities of the Routers were material to Plaintiffs' purchases, that Plaintiffs
 17 relied on TP-Link's speed representations, and that Plaintiffs would not have entered the contracts
 18 at those prices but for TP-Link's misrepresentations. Am. Compl. ¶¶ 51-99, 113-26, 155-64.
 19 Accordingly, the economic loss rule does not apply.

20 **F. The Complaint Adequately Pleads a Claim for Injunctive Relief**

21 TP-Link argues that Plaintiffs lack standing to seek injunctive relief because they do not
 22 allege that they are going to buy TP-Link Routers at particular times in the near future and thus
 23 their risk of future injury is not "actual or imminent." Dkt. #54 at 20. But this conception of
 24 Plaintiffs' position and their need for injunctive relief ignores controlling Ninth Circuit precedent.

25 In *Davidson*, the Ninth Circuit held that "a previously deceived consumer who brings a
 26 false advertising claim can allege that her inability to rely on the advertising in the future is an
 27 injury sufficient to grant her Article III standing to seek injunctive relief." 889 F.3d at 967. This is
 28 because "[k]nowledge that the advertisement or label was false in the past does not equate to

1 knowledge that it will remain false in the future.” *Id.* at 969. In particular, the Ninth Circuit held
 2 that Davidson had “adequately alleged that she faces an imminent or actual threat of future harm
 3 due to Kimberly-Clark’s false advertising” where she alleged that she “continues to desire to
 4 purchase wipes that are suitable for disposal in a household toilet”; “would purchase truly
 5 flushable wipes manufactured by [Kimberly-Clark] if it were possible”; “regularly visits stores . .
 6 . where [Kimberly-Clark’s] ‘flushable’ wipes are sold”; and is continually presented with
 7 Kimberly-Clark’s flushable wipes packaging but has “no way of determining whether the
 8 representation ‘flushable’ is in fact true.” *Id.* at 970-71.

9 Here, Plaintiffs similarly allege that each of them “intends to purchase high-speed routers
 10 in the future and intends to include TP-Link routers in [his/her] consideration of routers,” “[w]hen
 11 faced with TP-Link’s advertising and labeling in the future, [he or she] will be unable to
 12 determine the true speed of the router that [he or she] will be capable of experiencing for data
 13 transfer,” that he or she “will not know whether TP-Link’s speed representations must be
 14 interpreted as applying only to the ‘physical’ layer, nor the relationship between speeds at that
 15 layer and speeds that [he or she] will actually achieve for data transfer,” and that “in the absence
 16 of injunctive relief, [he or she] is likely to be harmed again by false, misleading, and unfair
 17 representations with respect to the data rates of the TP-Link Routers because [he or she] will be
 18 unable to determine whether such representations are false, misleading, or unfair, without
 19 purchasing and testing such TP-Link Routers.” Am. Compl. ¶¶ 60, 71, 80, 90, 99. Accordingly,
 20 each Plaintiff has pled an actual and imminent injury. *See Davidson*, 889 F.3d at 969-71 (noting
 21 that a consumer may plausibly allege “that she will be unable to rely on the product’s advertising
 22 or labeling in the future” or “that she might purchase the product in the future, despite the fact it
 23 was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume
 24 the product was improved,” and that “Davidson’s alleged harm is her inability to rely on the
 25 validity of the information advertised on Kimberly-Clark’s wipes despite her desire to purchase
 26 truly flushable wipes”).

27 TP Link asserts that Plaintiffs make only “mere professions of ‘some day’ intentions” to
 28 purchase a router again rather than “concrete plans,” of when they will buy routers again. But that

1 argument reflects a misunderstanding of *Davidson*. The Ninth Circuit did not require that a
 2 plaintiff specify a particular date or date range when she might purchase the product at issue on
 3 the mistaken belief that it had been improved, or the date when she will actually be looking at the
 4 product and decide not to purchase it because of her uncertainty regarding the truthfulness of the
 5 advertising or labeling, because the Ninth Circuit recognized that the harm justifying injunctive
 6 relief is an ongoing “informational” injury. *Id.* at 971-72 (explaining that if the plaintiff
 7 encountered the representation at issue again “today, she could not rely on that representation
 8 with any confidence” and that her injury was the state of “being unable to rely on [defendant’s]
 9 representations of its product in deciding whether or not she should purchase the product in the
 10 future”). In other words, the threat of injury to Plaintiffs does not just occur at the point of some
 11 actual future purchase, but exists *right now* (and will continue in the future until the Court issues
 12 an injunction) because Plaintiffs cannot rely on the truth of TP-Link’s representations despite
 13 their current desire to purchase a router at the advertised speeds.

14 TP-Link’s reliance on *Lanovaz v. Twinings N. Am., Inc.*, 726 F. App’x 590 (9th Cir. 2018)
 15 is misplaced. In *Lanovaz*, the Ninth Circuit upheld an order granting summary judgment after the
 16 plaintiff testified “that she would not purchase Twinings products again, even if the company
 17 removed the allegedly misleading labels.” *Id.* at 591. Plaintiffs here have alleged that they *will*
 18 consider TP-Link Routers in their next router purchases but that they face anxiety and uncertainty
 19 regarding TP-Link’s advertising and labeling practices, which is sufficient under *Davidson*.

20 Defendant’s reliance on *Rahman v. Mott’s LLP*, 2018 U.S. Dist. LEXIS 164620 (N.D. Cal.
 21 Sept. 25, 2018), is also misplaced. In *Rahman*, the issue was whether the statement ‘No Sugar
 22 Added’ on the defendant’s apple juice was false or misleading in light of the fact that the apple
 23 juice naturally contained sugar. *Id.* at *9. The defendant explained that “No Sugar Added” simply
 24 meant that it had not added sugar to the product. *Id.* The court concluded that plaintiff was now
 25 aware that his belief was “unfounded.” *Id.* at *10. Furthermore, in *Rahman*, the plaintiff could not
 26 allege that he could be deceived again in the future by the phrase “No Sugar Added.” A product
 27 with that representation would always have 0 grams of added sugar, and the amount of naturally
 28

1 occurring sugar would be the amount stated on the label. There was no future uncertainty to
 2 address.

3 Here, by contrast, Plaintiffs still cannot tell from TP-Link's marketing what actual speeds
 4 they can reasonably expect to have available to them if they were to purchase TP-Link Routers.
 5 Going forward, it is entirely possible that TP-Link could truthfully (or falsely) advertise a TP-
 6 Link Router as "delivering up to 1750Mbps of Wi-Fi speed" or as providing "1300 + 450Mbps
 7 Wireless Speed" or "1.75Gbps total available bandwidth." Although TP-Link argues it has thus
 8 far intended those representations to convey esoteric information concerning physical layers
 9 (rather than information about the actual speeds users care about, which is what the
 10 representations naturally convey), Plaintiffs cannot assume that TP-Link's speed representations
 11 will always have the same hyper-technical meaning and will not know what the *actual* speeds are
 12 or if they have improved. Without the injunctive relief requested, Plaintiffs cannot be certain
 13 whether TP-Link's speed representations can be taken at face value from a consumer perspective.
 14 Therefore, the uncertainty (or informational injury) recognized in *Davidson* afflicts Plaintiffs here
 15 and will continue to harm them until an injunction is entered.

16 Defendant's offhand reliance on a supposed disclaimer appearing in fine print at the
 17 bottom of one of its exhibits (see Dkt. #54 at 22, Dkt. #56-2 at 95) also does not foreclose
 18 Plaintiffs' entitlement to injunctive relief.

19 First, the versions of the websites submitted by TP-Link have not been authenticated and
 20 likely do not cover the entire relevant time period. They are merely attached to a "Request for
 21 Judicial Notice." Dkt. #54-1. There is no indication where and during what time period the
 22 relevant pages were in use or whether there were material variations (in content or format) in the
 23 documents or in any supposed disclaimers contained therein. In the absence of a more
 24 comprehensive authentication of the labels and their applicability, TP-Link's reliance on those
 25 labels cannot justify a dismissal of Plaintiffs' claims. *See Reed v. Gen. Mills, Inc.*, No. C19-0005-
 26 JCC, 2019 U.S. Dist. LEXIS 99388, at *6-8 (W.D. Wash. June 13, 2019) (holding it was
 27 inappropriate to take judicial notice of documents referenced in a complaint but still subject to
 28 disputes concerning authenticity and applicability); *Bruton v. Gerber Prods. Co.*, No. 12-CV-

1 02412-LHK, 2014 U.S. Dist. LEXIS 5493, at *17-18 (N.D. Cal. Jan. 15, 2014) (“[T]he Court
 2 concludes that Gerber’s present request goes beyond the scope of matters that may be properly
 3 subject to judicial notice and instead asks the Court to adjudicate factual disputes between the
 4 parties.”); *see also* Fed. R. Evid. 201(b) (providing for judicial notice only where a fact is not
 5 subject to reasonable dispute because it is “generally known within the trial court’s territorial
 6 jurisdiction” or “can be accurately and readily determined from sources whose accuracy cannot
 7 reasonably be questioned”). Plaintiffs’ allegations that Defendant failed to make adequate
 8 disclosures (Am. Compl. ¶¶ 6, 47-48, 119, 122) must be presumed true for purposes of this
 9 motion.

10 Second, the purported “disclaimer” referenced by TP-Link is not sufficiently clear or
 11 conspicuous to dispel, as a matter of law, the deceptive practices alleged by Plaintiffs. *See*
 12 *Williams*, 552 F.3d at 939 (explaining “reasonable consumers should [not] be expected to look
 13 beyond misleading representations on the front of the box to discover the truth from the ingredient
 14 list in small print on the side of the box”); *Silva v. Unique Bev. Co., LLC*, No. 3:17-cv-00391-HZ,
 15 2017 U.S. Dist. LEXIS 179362, at *13-14 (D. Or. Oct. 30, 2017) (explaining that a label as a
 16 whole could be misleading, given “the prominence of the coconut depictions on the front label
 17 and the word ‘Coconut,’” despite a disclosure on the back or side of a product that it contains no
 18 coconut).

19 As recognized by the Ninth Circuit in *Davidson*, allowing Plaintiffs to obtain the required
 20 injunction in federal court is the only way to avoid the anomaly of a state law claim that cannot be
 21 pursued in state court due to removal by an out-of-state defendant, yet cannot be pursued in
 22 federal court due to lack of Article III standing. *Id.* If mere knowledge that one had been deceived
 23 in the past defeated Article III standing, state law consumer protection statutes such as the UCL
 24 “would effectively be gutted” with respect to out-of-state defendants, because their primary
 25 remedy of injunctive relief would become unenforceable in federal diversity cases. *Id.* Indeed,
 26 that is exactly what TP-Link seeks to do, having removed this case to federal court. Accordingly,
 27 TP-Link’s motion to dismiss the injunctive (and declaratory) relief claims must be denied.
 28

G. The Complaint Appropriately Pleads Unjust Enrichment

TP-Link mistakenly asserts that Plaintiffs cannot plead an independent claim for unjust enrichment. This is not the law in the Ninth Circuit. In *Astiana*, the Ninth Circuit explained that, although unjust enrichment was not recognized as a standalone cause of action under California law, a claim for “unjust enrichment” could describe a valid claim that a defendant has been unjustly conferred a benefit “through mistake, fraud, coercion, or request.” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762-63 (9th Cir. 2015) (citing 55 Cal. Jur. 3d Restitution § 2). Accordingly, when a plaintiff “alleges unjust enrichment, a court may ‘construe the cause of action as a quasi-contract claim seeking restitution.’” *Id.* at 762 (quoting *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221 (2014)).

11 TP-Link relies on case law that was decided without the benefit of the Ninth Circuit’s
12 more recent decision in *Astiana*. Compare Dkt. #54 at 22 (citing *Stowers v. Wells Fargo Bank*,
13 N.A., No. 3:13-CV-05426-RS, 2014 WL 1245070, at *8, 2014 U.S. Dist. LEXIS 41712, at *26
14 (N.D. Cal. Mar. 25, 2014) (holding unjust enrichment could not be pled as a standalone claim))
15 with *Stafford v. Rite Aid Corp.*, No. 3:17-cv-1340-AJB-JLB, 2018 U.S. Dist. LEXIS 169580, at
16 *24-25 (S.D. Cal. Sep. 28, 2018) (recognizing Ninth Circuit rejection of position unjust
17 enrichment is not a cause of action). The cases Defendant cites also involved a complete failure
18 by the plaintiffs to identify any fraudulent inducement. See *Stowers*, 2014 U.S. Dist. LEXIS
19 41712, at *26 (plaintiff had failed to allege “the basic underlying requirement: enrichment that
20 lacks an adequate legal basis”); *In re iPhone 4S Consumer Litig.*, No. C 12-1127 CW, 2013 U.S.
21 Dist. LEXIS 103058 at *35 and *61-62 (N.D. Cal. July 23, 2013) (noting the plaintiffs’ failure to
22 plead “how” Apple had misled consumers and holding that plaintiffs in that case had not
23 adequately pled a quasi-contract theory supporting unjust enrichment).

24 Here, however, Plaintiffs adequately plead that TP-Link has been unjustly conferred the
25 benefit of sales and price premiums for the TP-Link Routers as a result of its fraudulent and
26 unlawful representations of those routers' actual speeds. This sufficiently states a claim for unjust
27 enrichment under *Astiana*, so the motion to dismiss Plaintiffs' unjust enrichment claim should be
28 denied. *See Astiana*, 783 F.3d at 762 (noting that plaintiff had alleged quasi-contract "because

1 Hain had ‘entic[ed]’ plaintiffs to purchase their products through ‘false and misleading’ labeling,
 2 and that Hain was ‘unjustly enriched’ as a result.”).

3 **H. If the Motion to Dismiss is Granted, Plaintiff Should Be Given
 4 Leave to Amend**

5 As shown above, the Amended Complaint pleads plausible claims that TP-Link is
 6 marketing and selling its TP-Link Routers using deceptive and false speed claims. If necessary,
 7 however, Plaintiffs could file a Second Amended Complaint to identify additional marketing,
 8 further details about Plaintiffs’ purchases and their present and future injuries, or other facts
 9 necessary to further address any of the bases of TP-Link’s motion. As such, amendment would
 10 not be futile and, if the Court decides to grant TP-Link’s motion in full or in part, it should give
 11 Plaintiffs leave to amend.

12 **I. TP-Link’s Alternative Motion to Strike Plaintiffs’ Class Allegations
 13 Should Be Denied**

14 Finally, in a premature challenge to class certification, Defendants move to strike
 15 Plaintiffs’ class allegations, referencing two previous arguments—(1) that Plaintiffs cannot
 16 represent purchasers of Routers that Plaintiffs did not themselves purchase and (2) that Plaintiffs’
 17 Amended Complaint is inconsistent with the original Complaint—and arguing that potential
 18 differences in how consumers intended to use the Routers and the speeds they actually
 19 experienced when using the Routers make class certification impossible in this case. Dkt. #54 at
 20 22-25.

21 As a preliminary matter, Plaintiffs’ class allegations are not a proper target of a motion
 22 under Rule 12(f). Rule 12(f) authorizes a court to strike “any redundant, immaterial, impertinent,
 23 or scandalous matter.” *See also Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir.
 24 2010) (holding a district court erred in striking certain damages claims because the allegations did
 25 not fit within any of the categories specified in Rule 12(f)). Plaintiffs’ class allegations do not fit
 26 any of these specified categories. The class allegations are not “immaterial” because they relate to
 27 Plaintiffs’ claims for relief. *Id.* (noting “[i]mmaterial matter is that which has no essential or
 28 important relationship to the claim for relief or the defenses being plead”) (quotation marks and

1 citation omitted). Plaintiffs' class allegations are also not "impertinent" because they pertain
 2 directly to the issues presented in this case. *Id.* (noting "[i]mpertinent matter consists of
 3 statements that do not pertain, and are not necessary, to the issues in question") (quotation marks
 4 and citation omitted). And TP-Link does not even attempt to argue that the allegations are
 5 redundant or scandalous.

6 Beyond the procedural problems with TP-Link's motion to strike, TP-Link's recycling of
 7 its arguments regarding non-purchased Router models and alleged inconsistency between
 8 Plaintiffs' pleadings should be rejected for the reasons set forth above. And TP-Link's additional
 9 arguments regarding the potential differences among consumers regarding their reasons for
 10 purchasing the Routers and their actual experiences with the Routers also fail to support the
 11 motion. A class action is appropriate where consumers were generally exposed to substantially
 12 similar misleading representations that were material to the purchase price of the products at
 13 issue, even if there is some variety among the class members regarding their particular intended
 14 uses of the products. *See Dickey v. Advanced Micro Devices, Inc.*, No. 15-cv-04922-HSG, 2019
 15 U.S. Dist. LEXIS 8740, at *13 (N.D. Cal. Jan. 17, 2019) ("In cases alleging misrepresentation,
 16 common issues predominate when plaintiffs are exposed to a common set of representations about
 17 a product.") (quotation marks and citation omitted); *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 242
 18 (N.D. Cal. 2014) (explaining that claims under the CLRA, UCL, and FAL are subject to common
 19 proof pursuant to the "reasonable consumer" standard). Moreover, as set forth in section IV(D)
 20 above, the injury at issue in this case is the price premiums for the Routers, not the consequential
 21 harms each class member experienced as a result of slow internet speeds or other data transfer
 22 issues. *See Davidson*, 889 F.3d at 965-66. The determination of that price premium is a standard
 23 common question in consumer class actions. Also, TP-Link's deception will be determined with
 24 reference to the actual speeds the TP-Link Routers are reasonably *capable* of achieving when
 25 used for wireless data transfer (just as many products can be characterized in terms of their
 26 general performance capacity), not based upon each consumer's actual, personal experience with
 27 a Router.

28

1 Because Plaintiffs' class allegations are not immaterial or impertinent to their claims,
2 Plaintiffs have adequately pled facts satisfying the criteria for a class action under Rule 23, and
3 Plaintiffs could otherwise amend their allegations to cure any pleading issues, and because the
4 issues raised by TP-Link should be addressed at the class certification stage, TP-Link's alternative
5 motion to strike Plaintiffs' class allegations should be denied. *See Lee v. Hertz Corp.*, 330 F.R.D.
6 557, 562 (N.D. Cal. 2019) (Seeborg, J.) (denying a motion to strike class allegations, because they
7 were "certainly not redundant, immaterial, impertinent, or scandalous," and noting that "a motion
8 to strike almost inevitably is a less efficient way of moving towards a resolution on the merits"
9 and that "such motions are rarely successful").

10

11

12

Respectfully submitted,

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Dated: July 24, 2019

GUTRIDE SAFIER LLP

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/s/Stephen M. Raab/

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